ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	WT Docket No. 96-6
Rules To Permit Flexible	)	
Offerings in the Commercial Mobile	)	
Radio Services	)	

REPLY COMMENTS OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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REPLY COMMENTS OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association ("PCIA") respectfully submits this reply to the opening comments filed in response to the *Further Notice of Proposed Rule Making* adopted by the Commission in the above-captioned proceeding.[1] As discussed in detail below, the opening comments reflected strong support for PCIA's recommendation that the Commission exercise its broad jurisdiction over commercial mobile radio service ("CMRS") offerings and expressly hold all interstate and intrastate applications provided by CMRS licensees -- including fixed services and combinations of fixed and mobile services -- subject to the same federal regulatory framework as mobile CMRS offerings.

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[1] *Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services,* 11 FCC Rcd 8965 (1996) (First Report and Order and Further Notice of Proposed Rule Making) [hereinafter *First Report and Order* and *Further Notice*].

I. INTRODUCTION AND SUMMARY

In the *Further Notice*, the Commission solicited commenters' views concerning the regulatory treatment of fixed wireless services that may not be considered ancillary, auxiliary, or incidental to mobile CMRS offerings.[2] The record demonstrates that a majority of commenters joined PCIA in urging the Commission to determine affirmatively that all services provided by CMRS licensees, including both interstate and intrastate fixed and hybrid offerings, are subject to the same federal regulatory requirements as mobile CMRS applications.

PCIA and its supporters explained that, as a matter of policy, establishment of a definitive and consistent regulatory classification for all mobile, fixed, and hybrid services provided by CMRS carriers is absolutely critical if the Commission hopes to facilitate the development of fixed wireless offerings. Because of this need for regulatory certainty, many parties further joined PCIA in urging the Commission *not* to adopt its proposal to establish merely a rebuttable *presumption* that wireless services provided under a CMRS provider's license fall within the definition of CMRS and will be regulated as CMRS. The record demonstrates that the Commission's procedure would deprive CMRS operators of any sense of regulatory predictability and would result in protracted and costly litigation. These consequences likely would serve as strong disincentives to the introduction of new fixed wireless applications.

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[2] *Id.* at 8977.

As legal support for their position, those commenters joining PCIA in requesting a federal regulatory structure for fixed CMRS demonstrated that the 1993 amendments to Sections 332(c) and 2(b) of the Communications Act of 1934, as amended ("1934 Act"), the "inseverability doctrine," and the Telecommunications Act of 1996 ("1996 Act") allow the FCC to preempt state regulation of fixed CMRS applications similarly to mobile wireless offerings. Several commenters further joined PCIA in suggesting that, if the Commission declines to declare that fixed and hybrid CMRS services are CMRS offerings, it should defer any decision to alter the regulation of fixed wireless services until such applications serve as a substitute for landline telephone exchange service for a substantial portion of the communications within a state.

In contrast to the many sound policy and legal reasons offered in support of subjecting fixed CMRS to federal regulation, those few commenters that did favor local regulation of fixed wireless offerings did not reconcile their positions with the fact that subjecting fixed CMRS to state regulation would undermine the procompetitive and deregulatory goals of this proceeding and would ignore the FCC's broad regulatory authority over CMRS operations. Finally, neither the record in this proceeding nor public policy considerations provide any support for the contention that, if a CMRS provider receives universal service funding, then it must be subject to the same regulatory regime as landline local exchange carriers.

II. THE OPENING COMMENTS REFLECT STRONG SUPPORT FOR PCIA'S REQUEST THAT THE COMMISSION DECLARE ALL INTERSTATE AND INTRASTATE FIXED AND HYBRID SERVICES OFFERED BY CMRS CARRIERS SUBJECT TO THE SAME FEDERAL REGULATORY TREATMENT AS MOBILE CMRS OFFERINGS

The opening comments contain strong support for PCIA's request that the Commission expressly hold that all interstate and intrastate fixed and hybrid services provided by CMRS carriers are subject to the same federal regulatory framework as mobile CMRS offerings. In light of the convincing record support for this position and the importance of a consistent federal regulatory scheme to the development of fixed wireless offerings, PCIA urges the Commission promptly to declare all offerings provided on CMRS spectrum CMRS services.

The vast majority of the opening commenters agreed that fixed and mobile CMRS applications must be subject to consistent regulatory and jurisdictional requirements if the benefits to be gained by permitting CMRS operations to offer fixed services are to be realized.[3] For example, Motorola, Inc. ("Motorola") stated that:

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[3] *See* Comments of AirTouch Communications, Inc. ("AirTouch"), at 3-6, 8; Comments of AT&T Corp. ("AT&T"), at 5-6; Comments of the Cellular Telecommunications Industry Association ("CTIA"), at 2; Comments of Comnet Cellular, at 2-3; Comments of Motorola, Inc. ("Motorola"), at 1, 4; Comments of Nextel Communications, Inc. ("Nextel"), at 9; Comments of Omnipoint Corporation ("Omnipoint"), at 7-9; Comments of the Rural Cellular Association, at 3, 5-6; Comments of the Rural Telecommunications Group, at 8-10; Comments of Sprint PCS L.P., d/b/a Sprint PCS ("Sprint PCS"), at 2, 4; Comments of U S West, Inc. ("U S West"), at 9; Comments of Western Wireless Corporation ("Western Wireless"), at 3, 6-7.

> Without consistent, federal regulation of fixed, mobile, and integrated CMRS offerings, the public interest benefits the Commission hopes to attain by allowing flexible use of CMRS spectrum are unlikely to be achieved. The prospect of having to comply with the regulatory requirements of numerous different states, or with uncertain and potentially inconsistent federal rules, will act as a strong deterrent to the offering of fixed wireless services.[4]

Similarly, the Rural Cellular Association ("RCA") urged the Commission to "promote and maintain a uniform regulatory approach to all CMRS services."[5] In support of this request, RCA echoed PCIA's view that, "[c]onsistency in regulatory treatment of all services developed from wireless technologies will encourage technological advancement, spur economic and rational deployment of facilities, remove investment uncertainties, and promote administrative efficiencies."[6]

Numerous commenters, including U S West, AirTouch, and others, also agreed that use of the rebuttable presumption proposed in the *Further Notice* would deprive CMRS providers of the regulatory certainty necessary to project business expenses and risks and, as a result, would dampen their willingness to invest in and offer innovative

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[4] Comments of Motorola, at 4.

[5] Comments of the Rural Cellular Association, at 3.

[6] *Id. See also* Comments of U S West, at 9 ("[d]isparate regulation of CMRS providers would frustrate the regulatory parity intent of the 1993 Budget Act . . . [and] would also impede increased consumer choice and competition objectives"); Comments of the Rural Telecommunications Group, at 9-10 ("[T]o preserve an optimum environment for the growth and development of CMRS, licensees need the ability to rely upon a uniform set of regulations that ensures regulatory parity among CMRS providers. Imposing a crazy-quilt of state provisions on CMRS will only stifle the introduction of competition into the current telecommunications marketplace, while simultaneously initiating an ineffectual stab at achieving regulatory parity between dissimilar services -- CMRS and land line telephone service") (emphasis omitted).

fixed and integrated services.[7] Several commenters also shared PCIA's concern that the rebuttable presumption would result in protracted and costly litigation.[8] For example, AirTouch stated that the proposed rebuttable presumption "is unduly cumbersome and cannot be squared with the Commission's express desire to allow CMRS providers maximum flexibility to provide fixed or mobile services or combinations of the two."[9] Likewise, U S West "strongly object[ed]" to the rebuttable presumption proposal and pointed out that "such an ad hoc scheme would be an administrative nightmare and a needless drain on the resources of both the Commission and the CMRS licensee."[10]

In addition, the comments reflected broad agreement that the Commission has the legal authority -- and an obligation -- to preempt state regulation of fixed CMRS

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[7] *See, e.g.,* Comments of AirTouch, at 3, 6; Comments of AT&T, at 5; Comments of CTIA, at 11-12; Comments of Comnet Cellular, at 2-3; Comments of Motorola, at 4; Comments of Nextel, at 2-3; Comments of Sprint Spectrum, at 2; Comments of U S West, at 7.

[8] *See, e.g.,* Comments of U S West, at 6-7; Comments of AirTouch, at 3, 6; Comments of AT&T, at 5; Comments of CTIA, at 11-12, 14-15; Comments of Comnet Cellular, at 4-5; Comments of Motorola, at 4; Comments of Nextel, at 2-3. In its comments, AirTouch also discussed the likelihood that competitors may use the rebuttable presumption process to challenge all fixed CMRS offerings in an effort to forestall or delay introduction of new service offerings. Comments of AirTouch, at 7. PCIA agrees with AirTouch's concern that the time and money required to resolve such disputes will act as an additional deterrent to competition and innovation. Similarly, PCIA concurs with AirTouch's view that simplification or modification of the rebuttable presumption procedure will not help overcome these problems.

[9] Comments of AirTouch, at 3 (internal quotes omitted).

[10] Comments of U S West, at 6.

services and to regulate fixed offerings provided by CMRS operators consistent with its regulation of mobile CMRS. In particular, several commenters agreed that Section 332(c) of the 1934 Act, the inseverability doctrine, and the 1996 Act all give the FCC broad authority to preempt state regulation of fixed and integrated CMRS applications in the same manner that state regulation of mobile wireless offerings has been preempted.[11]

Furthermore, as underscored by PCIA and AirTouch, the Telecommunications Act of 1996 reaffirms Congress's intent that federal regulation supersede state law with respect to all CMRS offerings. In particular, Sections 253(a) and (d) require the Commission to preempt state regulations that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[12] In addition, Section 253(e) specifically preserves the preemption provisions of Section 332(c) while Section 153(44) excludes CMRS providers from the definition of "local exchange carrier." PCIA agrees with AirTouch's suggestion that these provisions evidence Congress's awareness that, while CMRS providers offer telephone exchange and exchange access service, these providers

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[11] *See, e.g.,* Comments of AirTouch, at 11-12; Comments of CTIA, at 12-13; Comments of Motorola, at 5-8; Comments of Nextel, at 4-5; Comments of Omnipoint, at 2-3; Comments of the Rural Telecommunications Group, at 8; Comments of U S West, at 2.

[12] *See* 47 U.S.C. §§ 253(a), (d).

nevertheless are not necessarily to be regulated in the same manner as local exchange carriers.[13]

The comments also reflected widespread agreement that the plain language of the definitions contained in Sections 332(d)(1) and 3(27) of the 1934 Act and principles of regulatory parity authorize the Commission to regulate fixed applications offered by CMRS licensees in the same manner as mobile CMRS offerings.[14] As pointed out by AirTouch, "[t]he Budget Act . . . amended the definition of . . . mobile services in a manner that recognizes, and incorporates, the use of wireless technology to provide fixed services in competition with local exchange service."[15] PCIA also agrees with AirTouch that the legislative history of the Budget Act "indicates that Congress considered the possibility of using wireless technology to provide fixed services and elected to permit such services to be included within the definition of mobile services."[16]

In its opening comments, PCIA stated that, if the Commission did not clearly determine that all fixed CMRS offerings would be federally regulated as CMRS, then it might consider permitting the states to regulate fixed CMRS only when it serves as a

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[13] *See* Comments of AirTouch, at 11-12.

[14] *See, e.g.,* Comments of AirTouch, at 10; Comments of AT&T, at 7; Comments of CTIA, at 5-8; Comments of Motorola, at 7-8; Comments of Nextel, at 7-8; Comments of U S West, at 5.

[15] Comments of AirTouch, at 10.

[16] *Id.* (internal quotes omitted).

substitute for landline telephone exchange service for a substantial portion of the communications within the state.[17] However, in proposing this alternative, PCIA pointed out that CMRS is not likely to reach this level of substitutability for some time to come. PCIA therefore cautioned that the Commission should not make any definitive determination on this regulatory scheme until CMRS is in fact a substitute for a substantial portion of a state's communications traffic.

Both BellSouth and Western Wireless expressed support for this concept. Specifically, BellSouth stated that "the Commission should regulate any fixed wireless service provided by a CMRS provider as CMRS until 'such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.'"[18] Similarly, Western Wireless urged the Commission to establish a rebuttable presumption that all services provided over spectrum assigned for CMRS services are CMRS and to allow the presumption to be overcome only by a showing that a CMRS carrier is offering fixed services that act as a replacement for landline service within a substantial portion of a state.[19]

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[17] Comments of PCIA, at 12-14.

[18] Comments of BellSouth, at 2-3 (quoting 47 U.S.C. § 332(c)(3)(A)(ii)). *See also id.*, at 6 (stating that the Commission should rely on the standards contained in 47 U.S.C. § 332(c)(3) in determining whether the presumption that fixed CMRS is to be regulated as CMRS has been rebutted).

[19] Comments of Western Wireless, at 1.

III. THE FEW COMMENTERS THAT FAVOR LOCAL REGULATION OF FIXED WIRELESS OFFERINGS CANNOT RECONCILE THEIR POSITIONS WITH THE GOALS OF THIS PROCEEDING OR WITH THE 1934 ACT

Significantly, the few commenters -- namely the National Telephone Cooperative Association ("NCTA"), the National Association of Regulatory Utilities Commissioners ("NARUC"), the State of New York Department of Public Service ("NYDPS"), and the Public Utilities Commission of Ohio ("PUCO") -- that favor local regulation of fixed wireless offerings fail to address how use of such a procedure can be reconciled with Congress's broad mandate that all CMRS offerings be subject to a uniform "federal regulatory framework."[20] Similarly, these commenters do not address the well-documented fact, discussed in detail in the foregoing sections of this pleading, that inconsistent regulation of fixed and mobile CMRS offerings will seriously impede attainment of the goals underlying the instant proceeding by deterring the deployment of fixed wireless applications.[21]

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[20] *See* H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. 490 (1993) (Conference Report) (explaining that Congress intended to create a "federal regulatory framework governing the offering of all commercial mobile service[s]"). *See also supra*, pp. 6-8.

[21] For similar reasons, PCIA opposes the suggestion advanced in the Joint Comments of Bell Atlantic Corporation, NYNEX Corporation, and Bell Atlantic NYNEX Mobile Inc., urging the Commission to use a case-by-case regulatory process but suggesting that, because it is too early to adopt the criteria for making the underlying evaluation, the Commission should decide the regulatory treatment of fixed wireless offerings through requests for declaratory rulings. *See* Comments of Bell Atlantic Corp., NYNEX Corp., and Bell Atlantic NYNEX Mobile Inc., at 5 & n.12. This approach would offer CMRS operators absolutely no regulatory certainty or

(continued...)

Furthermore, NARUC, NCTA, NYDPS, and PUCO fail to set forth any valid justification for their suggestion that fixed wireless offerings should be subject to local regulation. NARUC premises its position on the assertion that fixed services have historically been excluded from the definition of mobile services and the fact that Basic Exchange Telephone Radio Systems ("BETRS") services are not mobile services.[22] Neither of these arguments is compelling. As discussed above, Congress's 1993 amendments to the 1934 Act redefined "mobile services" in a manner that encompasses fixed wireless offerings. Moreover, the fact that BETRS services are not mobile services is irrelevant. As noted by U S West in its comments, BETRS offerings are not provided over CMRS spectrum or through CMRS licenses,[23] and are not competitive with CMRS services.

NTCA opposes regulation of fixed wireless services as CMRS because of an alleged disadvantage to wireline providers, primarily rural telephone companies.[24] NTCA's concerns are, however, entirely speculative and overlook the fact that Section 332(c)(3)(A) permits states to petition the FCC for authority to regulate CMRS offerings if necessary to protect consumers from anticompetitive conduct evidenced by

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[21](...continued)
guarantee of consistent regulatory treatment and would be unmanageable from an administrative standpoint.

[22] *See* Comments of NARUC, at 3-4.

[23] *See* Comments of U S West, at 5-6.

[24] Comments of NTCA, at 3-5.

unjust or unreasonable rates. Furthermore, like NARUC, PUCO and the NYDPS place primary reliance on the fact that wireless local loop services have historically been subject to local regulation. In doing so, these commenters fail to take into account Congress's 1993 amendments giving the FCC broad jurisdiction over virtually all activities of CMRS providers.[25]

IV. THE SUGGESTION THAT CMRS OFFERINGS THAT RECEIVE A UNIVERSAL SERVICE SUBSIDY SHOULD BE REGULATED AS LOCAL EXCHANGE CARRIAGE LACKS ANY LEGAL BASIS AND SHOULD BE REJECTED

There is no legal basis for some commenters' suggestion that, if a CMRS provider applies for and receives a subsidy from the federal or state universal service fund, the subsidized service should be regulated as local exchange carriage.[26] As a matter of law, the issue of which carriers are eligible for universal service funds is addressed in Sections 254(e) and 214(e), neither of which prescribe the regulatory regime to which these carriers are to be subject. Thus, nothing in Section 254 requires the recipient of universal funds to be subject to a particular regulatory stricture.

Further, the regulatory treatment of CMRS providers *is* described in Section 332(c), which states that CMRS providers are generally subject to federal regulation until "such service is a replacement for land line telephone exchange service for a

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[25] *See* Comments of PUCO, at 3-5; Comments of NYDPS, at 2.

[26] *See* Comments of CommNet Cellular Inc., at 5; Comments of the Pacific Telesis Group, at 3.

substantial portion of the telephone land line exchange service within such State."[27] Importantly, Section 332(c) makes no mention of the receipt of universal service funds as having any bearing on how CMRS providers are to be regulated. Moreover, because CMRS is not expected to reach the requisite level of substitutability for a number of years -- if ever -- it is currently premature to even consider state regulation of CMRS, regardless of whether the provider in question receives universal service funds.[28]

V. CONCLUSION

As detailed above, the opening comments reflect broad agreement with PCIA's suggestion that, to encourage CMRS licensees to offer fixed and integrated fixed and mobile services, it is essential that the Commission exercise its broad jurisdiction over CMRS licensees and categorically state that all services provided by CMRS operators on CMRS spectrum, including fixed and hybrid services, are subject to the same federal regulatory requirements as mobile CMRS applications. The commenters generally agree that, without consistent, federal regulatory treatment of all services offered by CMRS carriers, the important public interest benefits that stand to be gained

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[27] 47 U.S.C. § 332(c)(3)(A)(ii).

[28] Comments of PCIA, at 14 (citing Comments of United States Department of Justice, WT Docket No. 96-6, at 3 (filed March 1, 1996)).

as a result of the Commission's decision to allow CMRS licensees to offer fixed, mobile, and integrated services are unlikely to be realized.

Respectfully submitted,

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Dated: December 24, 1996

CERTIFICATE OF SERVICE

I, Robin Walker, hereby certify that on this 24th day of December, 1996, I caused a true copy of the foregoing "Reply Comments of the Personal Communications Industry Association" to be delivered to the following persons via hand delivery:

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